

# Labor AND Employment Law

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## Supreme Court Affirms Application of FMLA to State Government Employees

Wondering whether the Supreme Court has changed course in its movement toward immunization of state governments from federal employment laws, employment lawyers are reviewing the Supreme Court's May 27 decision in *Nevada Department of Human Resources v. Hibbs*.

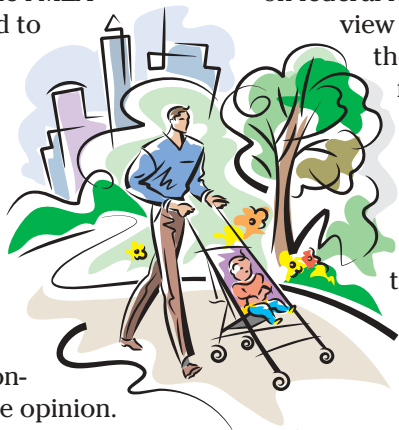
By a 6-3 vote, the Court affirmed a Ninth Circuit ruling that the Family and Medical Leave Act applies to state employees and that in enacting the FMLA Congress intended to remove state sovereign immunity. Chief Justice Rehnquist and Justice O'Connor joined Justices Breyer, Ginsburg, and Souter in the majority opinion. Justice Stevens concurred by separate opinion.

Section leaders did not see *Hibbs* as a departure from the Rehnquist Court's earlier state immunity decisions. "The Court has again made clear that there are limits to its Eleventh Amendment

jurisprudence barring private suits for damages against State agencies," said Richard Seymour of Lief, Cabraser, Heimann & Bernstein in Washington. "The fact that Chief Justice Rehnquist wrote the opinion underscores that lesson."

David Cathcart of Gibson, Dunn & Crutcher in Los Angeles finds *Hibbs* "entirely consistent with the Court's recently reaffirmed sensitivity" to constitutional limitations on federal legislation. "Close review of *Hibbs* suggests that there is less here than first appears," he said. "*Hibbs* reaffirms the Court's continuing deference to federal statutes barring employment discrimination by public employers based on gender and race or color stereotypes."

William Hibbs sued for damages under the FMLA related to his termination by the Nevada Department of Human Resources following a leave of absence to care for his wife after an auto accident. The district court



## Annual Meeting Just Around the Corner

There is still time to register for the Section's most important and well-attended meeting of the year! Although the early-bird registration deadline has passed, on-site registrations will be taken at the ABA Headquarters in the Moscone Convention Center in San Francisco.

With the exception of the "Basics" programming, Section programs will be presented at the Grand Hyatt Union Square Hotel, just off Union Square, August 9-12. To view the current schedule of events, visit [www.abanet.org/labor](http://www.abanet.org/labor) under "Don't Miss it" on the homepage.

If you have a question on your registration, please call I.T.S. at 800/421-0450.



granted summary judgment dismissing the case on the grounds that Nevada was immune from suit for money damages under the FMLA. The Ninth Circuit Court of Appeals reversed.

In an opinion by Chief Justice Rehnquist, the Court stated the principle that under the Eleventh Amendment states are immune from federal jurisdiction absent their consent, but that Congress can "abrogate" that immunity by making its intent to do so "unmistakably clear" and by acting under a valid

exercise of its power under the Fourteenth Amendment to enact "appropriate legislation" to guarantee equal protection of the laws.

The Court noted that Congress had purported to enact the FMLA under both its Commerce Clause and Fourteenth Amendment powers. Rehnquist stated that the commerce power is insufficient to remove a state's immunity from suit, which principle is a hallmark of the Rehnquist Court's "new federalism" analysis. This left the

*continued on page 9*

# Comments



## from the Chair

Jana Howard Carey

In this “State of the Section” commentary, you will see many reasons why we should be very proud of our Section’s record of increasing and improving member services, and optimistic about our ability to continue the trend. The enthusiasm and hard work of our committees and task forces, some of which I want to spotlight, make this possible.

First of all, the Section’s 21 Standing Committees on substantive issues—the true lifeblood of the Section and the most direct providers of member services—continue to grow. Attendance at the midwinter meetings was up this year, increasing by more than 5 percent overall. The reason is evident—the CLE programming at these meetings cannot be beat, due to the efforts of the committees’ leadership.

**Midwinter meeting attendance was up 5 percent.**

With regard to Section-wide member services, our publications continue to increase both in number and in content. The Section currently has 18 treatises in print, most with supplements. Eight new titles are currently being written. This newsletter, which has recently become more vibrant in both appearance and content, is further evidence of our efforts on the publications front.

The Section’s CLE activities also are growing apace. Since September 2002, more than 2,600 lawyers have attended 11 teleconferences and satellite TV programs produced by the Section,

and nine more are in the works. In addition, the Section already has produced this year 15 regional programs geared to give new lawyers and generalists the “basics” on various aspects of labor and employment law. Eleven additional “basics” programs were featured at the Annual Meeting, where the Section presented more than 95 additional hours of CLE programming—more than any other Section except Business Law. Finally, our highly regarded Federal Law Clerk Training Program, produced in conjunction with the Federal Judicial Center, won very high marks from almost 70 federal law clerks and judges who participated last fall.

In an exciting new development, the Section is launching a “Nationwide Media Outreach Project,” which will provide members of the national and local media with lists of experienced labor and employment lawyers who agree to make themselves available for interviews and commentary. The media will gain access to Section members capable of providing informative and balanced reports on labor and employment issues and developments, and participating Section members will gain exposure to the public and experience in dealing with the media.

The Section has also made significant efforts this year to assist our members with their pro bono obligations. A new administrative committee on Pro Bono Work was established. Under the able leadership of Marty Wagner and Jim Singer, it already has produced a CLE program—Pro Bono 101 for Labor and Employment Lawyers. The committee will present a pro bono awards program at this year’s annual meeting, and will post a list of labor and

employment law-related pro bono opportunities on the Section’s website.

The Section is also engaged in a number of efforts to expand our reach and to increase the diversity of our membership. Our new Task Force on Outreach to Aspiring and Young Lawyers is developing items for our web page and other programs that should be of special interest to younger lawyers. Our new Task Force on Outreach to Government Lawyers and Academicians has surveyed law school professors to assess how we can better meet their needs, and has developed a list of objectives and strategies for increasing the number of government lawyers among our ranks. Since its inception in 2001, our Task Force on Outreach to Law School Students has made presentations at more than half of the nation’s 184 accredited law schools, and approximately 10 percent of the attendees have since joined the Section. We expect our law student membership to further increase as the result of a new program in the works—a Trial Advocacy Competition that will pit trial advocacy teams from various law schools against each other, hopefully culminating eventually in a national competition.

As younger lawyers, academicians, and government lawyers tend to be a more diverse group than private practitioners, the addition of more members in these categories will also improve our diversity picture. To help us retain new members, our marketing committee is developing a program that will provide them with seasoned Section members from their geographic region as personal mentors. We will kick off this program in one region, and then expand it into a nationwide program.

Finally, our Section is aggressively pursuing sources of revenue other than member dues to enable us to finance scholarships, pay expenses, and reduce dues for lawyers who could not otherwise participate in our activities. Our new Task Force on Sponsorships, Donors, and Grants has successfully established a pricing schedule for corporate sponsorships for our programs and other products. We currently are negotiating with potential sponsors and working on establishing strategic alliances with others who might provide in-kind and cash contributions to the Section in exchange for some form of recognition from the ABA. We hope to have some additional revenue streams in place by the end of this fiscal year, and with that beginning, there literally is no limit on our ability to continue to expand our membership and improve our membership services for the future.

And speaking of the future, I know the Section will be in good hands under the leadership of the incoming Chair, Steve Gordon. Steve has been a wonderful supporter over the past year, and his energy and enthusiasm will be tremendous assets to the Section as we move forward. ■

## Labor AND Employment Law

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**Chair,** Jana Howard Carey, Baltimore, MD

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### Co-Editors of the Newsletter

Elliot Bredhoff, Bredhoff & Kaiser, 805 15th St. NW, Suite 1000, Washington, DC 20005 202/842-2600

Elaine Saphier Fox, Dancona & Pflaum, 111 E. Wacker Drive, Suite 2800, Chicago, IL 60601-4209 312/602-2178

Mark Risk, D'Agostino, Levine & Landesman, L.L.P., 345 Seventh Ave., 23rd Floor, New York, NY 10001 212/564-9800

**ABA Publishing Editor,** Monica Buckley

**ABA Publishing Designer,** Mary Anne Kulchawik

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# Profile

## Betty Murphy's Portrait

Betty Southard Murphy has served as Administrator of the Wage and Hour Division of the Department of Labor and Chair of the National Labor Relations Board (NLRB), and has had five other presidential appointments. She is a founding member of the Section's International Labor Law Committee and has served as a speaker and writer throughout her association career, which has included stints with several ABA sections. She currently chairs the International Committee of the ABA Dispute Resolution Section.

Murphy has tried cases or otherwise appeared in courts in 25 states, nine U.S. Courts of Appeals, and the Supreme Court. Since 1980, she has practiced as a partner at Baker & Hostetler LLP in Washington, D.C., where she was the first woman to head the firm's National Labor and Employment Practice Group and serve on its Management Committee.

None of her career path was fore-ordained. It took work, planning, and one very critical attribute. "My mother taught me that the most important word in the English language is 'confidence,'" she says.

Murphy grew up in Atlantic City, New Jersey. Her father died when she was very young. An uncle paid for her college education at Ohio State University. After further study in Paris on a scholarship, her uncle gave her a non-refundable air ticket for travel around the world, but no cash. She was gone for a year, spending six months in New Delhi. She paid her expenses by writing short articles and offering them to American newspapers, which, if they accepted them, would wire her money at American Express offices along her journey.

On returning home, Murphy obtained a job with United Press International (UPI) in Washington,

D.C. She took two law school courses at Washington College of Law (WCL) at American University to position herself to bid for the UPI Supreme Court beat. But when WCL offered her a scholarship, she stayed to graduate. Murphy then accepted a job offer at the NLRB, on the advice that it had the "best supervisors anywhere in the federal government." "It still does," she says.

After 18 months at the NLRB, Murphy joined Roberts & McInnis, then a 30-lawyer D.C. firm. She spent 13 years there, the last 11 as

*twice as good?*" She started getting involved in women's bar association activities and became a founding Republican member of the National Women's Political Caucus.

She represented female State Department employees who had resigned under official policy upon their marriages to fellow Department employees. She settled the case, and the women were invited back. Then a Foreign Service officer in Venezuela who had stopped receiving promotions after getting married called Murphy for help. "Her personnel file was a plaintiff

one who took the children to their after-school activities. He never had any idea of 'woman's work.' Whoever got home first would start dinner. And he always encouraged me to do more professionally."

Murphy also credits live-in help. Thirty-two years ago, Astevia Rodriguez, then in her 40s, joined the Murphy family as a nanny. The children are grown now, but Rodriguez continues to live with the Murphys.

In 1974, Murphy was confirmed as Administrator of the Wage and Hour Division. In 1975, she became NLRB Chair. She oversaw board productivity increases of 30 percent, and when she resigned in 1979, the AFL-CIO, the Chamber of Commerce, the National Association of Manufacturers, and the Teamsters all issued statements saying they were sorry to see her go. She is the only woman ever to serve as Chair of the NLRB.

She chose her current firm, Baker & Hostetler LLP, for its mid-western values and ethics. "I believe in the honorable practice of law," Murphy says. "We've fired clients who've refused to keep their word. If a law firm refers a matter to us, we would never try to steal the client." If a case should be settled, "we settle it."

Baker & Hostetler commissioned her portrait last year, and Murphy asked that the artist, Dani Dawson, include other things in the portrait—photos of her family, President Reagan, and Sen. Orrin Hatch (R-UT), the U.S. Constitution, and symbols like a hard hat, airplane, and truck representing clients. Dawson expressed concern that the added items would distract from the subject. "And I told her," Murphy says, "that is the idea." ■

*Co-editors Mark Risk and Elaine Saphier Fox interviewed Ms. Murphy for this article.*



Murphy requested that photos of family, President Reagan, and Senator Hatch, along with symbols of her work, be included in her portrait.

a partner, handling labor matters for both employers and unions.

"I never felt discriminated against as a woman lawyer," she says. But in the early 1970s when a senior partner told her that clients thought she must be twice as good as any man in order to be a partner there, she says she began to wonder, "Why do I have to be

lawyer's dream. It had notations like 'She wants the best of both worlds. She wants to be a mother and have a career.'"

"If you're a woman and you want to be a lawyer and have children, you have to have a cooperative husband," she says. And she did. Cornelius Murphy, M.D., was a radiologist in a hospital. "He was the



# Spotlight on...

## Immigration Law Committee

### Impressive Program Lineup Planned for Annual Meeting

The recently revitalized Immigration Law Committee is off to an energetic fresh start with a host of interesting activities. In light of new regulatory and policy changes implemented after September 11, 2001; and the recent reorganization of the Immigration and Naturalization Service, the practice of immigration law is undergoing major changes. The committee will serve as a useful resource to the ABA membership and a key liaison between our membership and the various government agencies involved in the immigration process during this challenging time. The committee, composed of full-time immigration practitioners as well as labor and employment lawyers who may practice immigration law on a

more limited basis, will focus its programs primarily on issues involving employment-based immigration and immigration-related labor and employment law issues.

The committee views increasing its membership and participation in general Section activities and events as critical. Wasting no time, the Immigration Law Committee held its first midyear meeting in Washington, D.C., in April. The program featured a roundtable discussion between representatives of various government agencies and our membership regarding selected areas of business-related immigration where there is an overlap between the agencies. Participants had an opportunity to discuss emerging issues with representatives from

the Department of Labor, Social Security Administration, and the Bureau of Citizenship and Immigration Services. The second part of the program focused on a dis-

The committee is planning to continue its initiative with three programs and activities at the ABA Annual Meeting in San Francisco. We will conduct a basics

### The revitalized committee will address major changes in immigration law since September 11.

cussion of various areas where there is an intersection between immigration and labor and employment law. In addition to our midyear program, our committee cosponsored a basics program with ALI-ABA in May.

program focusing on an overview of various temporary work visas and the permanent residency process. This program, which will be led by expert immigration practitioners, is designed for individuals with limited or no previous exposure to immigration law. The committee is also planning a program that will encompass not only substantive legal updates and education regarding corporate compliance—which should be very useful to our labor and corporate colleagues—but also a discussion of the recent significant changes in the rights of foreign nationals in the United States after the *Hoffman Plastics* decision. This promises to be a very worthwhile program and an excellent introduction to the overlap of immigration law with labor and employment law issues.

In addition, we will hold a committee business meeting to discuss programs and activities for next year. We encourage all those who are interested to participate. If you cannot attend this meeting but would still like to become a member of the committee, please contact Karen Koenig, employer co-chair, at [karenkoenig@paulhastings.com](mailto:karenkoenig@paulhastings.com). We look forward to seeing you in San Francisco! ■

## International Labor Law: Meeting the Challenges of Globalization

The University of Western Ontario Faculty of Law and Heenan Blaikie LLP will host a Conference on International Labor Law at the University of Western Ontario Faculty of Law in London, Ontario, on Saturday, October 18, 2003. This innovative conference will be the first of its kind in Canada to focus exclusively on international labor law and globalization. At the Conference, prominent members of international organizations, representatives of government, employers, and workers, senior members of the judiciary, chairs of labor relations boards, and preminent academics from the United States, Canada, and Europe will gather to present their views on the future directions of international labor law. To receive a conference preview, please contact John Craig at (416) 360-3527 or by e-mail at [jcraig@heenan.ca](mailto:jcraig@heenan.ca).



# More Best Practices Identified for Diversity Plan Implementation

The goals of the Section's Diversity Plan are to recruit minority lawyers, women lawyers, lawyers with disabilities, and newer lawyers to Section membership; foster an atmosphere of inclusion to assist in retaining them once they become Section members; seek participation of minority lawyers, women lawyers, lawyers with disabilities, and newer lawyers on panels, task forces, and working groups; and provide those lawyers with opportunities and training to take on leadership roles at both the committee and the Section level.

The Section's **Committee on Equal Opportunity in the Legal Profession** is charged with overseeing the Section's diversity efforts. Among other things, the

committee seeks to identify "Best Practices" employed by various Section entities to implement the Diversity Plan. We're delighted to report a number of new "Best Practices" from recent Committee Midwinter Meetings:

Prior to its Midwinter Meeting, the **Equal Employment Opportunity Committee** contacted each new attendee via e-mail to offer the option of pairing with a mentor. The meeting's kick-off event was a new and returning member breakfast matching new attendees with Section mentors and providing the opportunity for them to meet committee leadership and learn about and sign up for committee activities. Some new attendees got immediately involved by, for example, becoming "reporters"

for the committee newsletter.

The **Development of the Law Under the NLRA Committee** assigned mentors to first-time attendees at its recently completed Midwinter Meeting. Feedback from the committee's new attendees has been very positive, with many reporting that they felt welcome and made to feel part of the committee. New attendees were strongly encouraged to participate actively in the committee's work, with an emphasis placed on opportunities to speak on program issues.

The **State and Local Government Bargaining and Employment Law Committee** assigned a co-chair or other long-time committee member to each of the new Midwinter attendees, introduced

them to other members, and accompanied them to program dinners. All new attendees were formally introduced at the welcoming cocktail party and during daily meetings.

Congratulations to these committees for their efforts. We will continue to highlight "Best Practices" in the Section newsletter, on the website, and in other communications. For more information on the Diversity Plan and/or the work of the Committee on Equal Opportunity in the Legal Profession, please contact any of its co-chairs: Kay Baldwin, at [katherine.baldwin@usdoj.gov](mailto:katherine.baldwin@usdoj.gov); Denise Clark, at [dmclark@hereiufund.com](mailto:dmclark@hereiufund.com); Gail Golman Holtzman, at [gholtzman@constangy.com](mailto:gholtzman@constangy.com); or Helen Norton, at [helennorton1@excite.com](mailto:helennorton1@excite.com). ■

## Nationwide Mentoring Meeting

### An Event for All to Attend!

The Section is proud to offer its members the opportunity to participate in the Nationwide Mentoring Program, an initiative seeking to pair lawyers who are new to the profession and Section with veteran members to guide professional development and activity within the Section. A working meeting has been scheduled for current and future program participants at the ABA Annual Meeting on **Sunday, August 10, from 8:00AM-9:00AM at the Grand Hyatt Hotel Union Square** in San Francisco.

This session will provide an opportunity to meet fellow mentees and mentors and to learn more about the mentoring process. For more information on the program, visit [www.abanet.org/labor/mentors.html](http://www.abanet.org/labor/mentors.html).

**Special Note:** *The New England region of the Mentoring Program is fully staffed with mentors and is seeking mentees. If you are a lawyer in Massachusetts, Maine, Vermont, New Hampshire, Connecticut, or Rhode Island with less than five years of experience, you are urged to download the mentee application at [www.abanet.org/labor/mentors.html](http://www.abanet.org/labor/mentors.html) to be immediately paired with a mentor.*



## Seeking Articles

The editors of *Labor and Employment Law* are always looking for articles containing information that our Section members can use. This could include coverage of Supreme Court decisions, and other important cases or trends in the labor and employment law field. Please submit your article of no more than 800 words, for editorial board consideration, to Monica Buckley, ABA staff editor, at [buckleym@staff.abanet.org](mailto:buckleym@staff.abanet.org). ■



## It Starts With a Plan

**Question:** Given that increased billable-hour requirements already make time scarce, what strategies do you suggest for a young lawyer who wants to be involved in the profession or the community outside her own office?

**Answer, from Betty Southard Murphy, Baker & Hostetler, Washington, D.C.**

With a little planning, a little common sense, and a little luck, it is not difficult to have a successful legal career and a satisfying and happy life outside the law office.

I decided when I was a young lawyer that I wanted to be a rainmaker. I wanted to choose the cases I worked on instead of being assigned work by someone

else. I wanted the freedom to become involved in Republican politics and give something back to my community. I also wanted to get married, have children, and do other things. Like most things in life, however, none of this was going to just happen on its own. I needed a plan. If you want to get involved in a number of activities and still have a great career in the law, you will need a plan, too. Here's what to do:

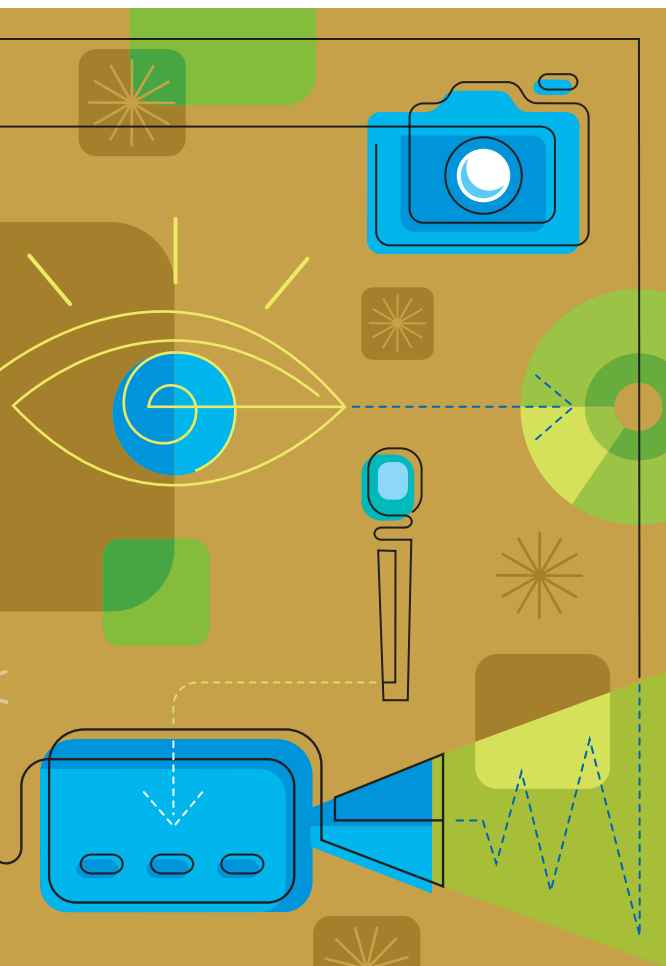
Clients will choose to work with you because of your reputation and your credibility. Doctors take an oath to "first do no harm." There is a lesson here for lawyers: "First do nothing to hurt your reputation and your credibility." You build a reputation and credibility with one

activity and one case at a time.

No matter how busy you think you are, you can be more efficient. Be sure you understand the assignment and the goal before you start "researching." Chances are someone else has written something on the same subject, or there is a law review article to start you off. As you become more efficient, you will enhance your reputation. You will learn to complete projects faster and have more time to invest in your family, the bar, community activities, or politics—which is extremely important and fun.

You will find that you have time to join one bar association and one committee. You also have time to join one non-law-related

organization and one committee. It does absolutely no good to belong to an organization and not have a leadership role. When you select a committee, make a commitment to be an active, hard-working leader. When you have done all you can, move on to a different committee and repeat the process. Not only do you learn something from each committee, but you also meet new people who will refer business to you. You get back much more than you give. You will find that your contacts grow, your success as a lawyer increases, and your personal satisfaction with your life gets a boost in the process. The whole thing starts with a plan. Make yours today. ■



### Media Program Aims to Provide Resource for the Press

News is made every day in the dynamic field of labor and employment law. Media coverage of industry-defining cases gives the world a window into the developments that shape the American workplace. In an effort to provide reporters with a reliable, informed resource for commentary on these matters with a local perspective, the Section has launched the Nationwide Media Program.

This exciting new Section initiative aims to establish affiliation-balanced media panels in all major U.S. media markets. Local panel members will be available to the press when feedback is needed for a pending story. Program applicants are required to be Section members, to have at least seven years of labor and employment law practice experience, and to be a member of at least one of the Section's substantive committees.

For more information and to access an online application, visit [www.abanet.org/labor/media.html](http://www.abanet.org/labor/media.html).

## Pro Bono Update

To assist you in finding pro bono opportunities related to labor and employment law, the Section has created a website for just those opportunities! You can access these pro bono opportunities at [www.abanet.org/labor](http://www.abanet.org/labor) and select "Section News" to view.

Also, be sure to visit [www.abanet.org/legalservices/probono/directory](http://www.abanet.org/legalservices/probono/directory) to view a comprehensive directory of pro bono programs. This site is managed by the ABA's Center for Pro Bono, is searchable by state, and is updated frequently. If you have any questions or would like additional information on these programs, please contact the Center at 312/988-5769. ■

# Order These Resources Today and Receive Your Section Discounts!

Call BNA Books at 1-800-960-1220 and refer to **Priority Code ABALE** to receive the **Special Section Discount Prices** noted below. For additional information, including tables of contents, contributor lists, and publication dates, visit <http://www.bnabooks.com/ababna/index.html>.

## Section Treatises

### **Covenants Not to Compete:**

#### **A State-by-State Survey, 3rd Edition**

Order #1345-ABALE

List Price: \$495.00/Section Member Price: \$371.25

#### **2003 Supplement**

Order #1415-ABALE

List Price: \$215.00/Section Member Price: \$86.00 (Due October 2003)

**NEW!**

### **The Developing Labor Law, 4th Edition**

Order #1151-ABALE

List Price: \$515.00/Section Member Price: \$386.25

#### **2003 Cumulative Supplement**

Order #1416-ABALE

List Price: \$175.00/Section Member Price: \$70.00 (Due October 2003)

**NEW!**

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Order #1060-ABALE

List Price: \$95.00/Section Member Price: \$76.00

#### **2001 Supplement**

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List Price: \$65.00/Section Member Price: \$52.00

### **Employee Benefits Law, 2nd Edition\***

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List Price: \$130.00/Section Member Price: \$52.00

### **Employee Duty of Loyalty: A State-by-State Survey, 2nd Edition**

Order #1182-ABALE

List Price: \$295.00/Section Member Price: \$221.25

#### **2003 Cumulative Supplement**

Order #1382-ABALE

List Price: \$185.00/Section Member Price: \$74.00

**NEW!**

### **Employment Discrimination Law, 3rd Edition**

Order #0791-ABALE

List Price: \$445.00/Section Price: \$333.75

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List Price: \$235.00/Section Member Price: \$94.00

### **Employment Termination: Rights and Remedies, 2nd Edition**

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List Price: \$145.00/Section Member Price: \$108.75

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Order #1184-ABALE

List Price: \$115.00/Section Member Price: \$46.00

**NEW!**

### **Equal Employment Law Update Fall 2000 Edition**

(9/98-9/00, with Supreme Court cases current through 2002)

Order #1272-ABALE

List Price: \$165.00/Section Member Price: \$123.75

#### **Spring 2000 Edition (3/98-3/00)**

Order #1235-ABALE

List Price: \$135.00/Section Member Price: \$101.25

#### **Spring 2000 Edition on CD**

Order #C235-ABALE

List Price: \$100.00/Section Member Price: \$75.00

#### **Spring 1998 Edition (3/96-3/98)**

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List Price: \$95.00/Section Member Price: \$71.25

#### **1996 Edition (3/94-3/96)**

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**NEW!**

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### **Elkouri & Elkouri: How Arbitration Works, 5th Edition**

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List Price: \$135.00/Section Member Price: \$108.00

#### **1999 Supplement**

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List Price: \$70.00/Section Member Price: \$56.00

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### **International Labor and Employment Laws, Vol. I**

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List Price: \$295.00/Section Member Price: \$236.00

#### **2002 Cumulative Supplement**

Order #1321-ABALE

List Price: \$165.00/Section Member Price: \$132.00

### **International Labor and Employment Laws, Vol. II**

Order #1103-ABALE

List Price: \$295.00/Section Member Price: \$236.00

#### **2002 Supplement**

Order #1322-ABALE

List Price: \$135.00/Section Member Price: \$108.00

### **Labor Arbitration: Cases and Materials for Advocates**

Order #1036-ABALE

List Price: \$45.00/Section Member Price: \$36.00

### **Labor Arbitration: A Practical Guide for Advocates**

Order #0635-ABALE

List Price: \$55.00/Section Member Price: \$44.00

### **Labor Arbitrator Development: A Handbook**

Order #0430-ABALE

List Price: \$55.00/Section Member Price: \$44.00

### **Labor Union Law and Regulation**

Order #1352-ABALE

List Price: \$225.00/Section Member Price: \$168.75

**NEW!**

### **Occupational Safety and Health Law, 2nd Edition**

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List Price: \$265.00/Section Member Price: \$198.75

### **The Railway Labor Act**

Order #0815-ABALE

List Price: \$255.00/Section Member Price: \$204.00

#### **2001 Cumulative Supplement**

Order #1294-ABALE

List Price: \$160.00/Section Member Price: \$128.00

### **Trade Secrets: A State-by-State Survey, 2nd Edition**

Order #1405-ABALE

List Price: \$315.00/Section Member Price: \$236.25 (Due August 2003)

**NEW!**

## **\* NOTICE...**

**Employee Benefits Law, Second Edition** is available in electronic form in BNA's *Benefits Practice Center*, with hyperlinks to text of cases. Section members receive a discount on subscriptions to the treatise component in the *Center*. Contact your BNA sales representative for more information, or call 1-800-372-1033.



# The Section Remembers

David Feller

David Feller, a major figure in the development of U.S. labor law, was the subject of a Resolution adopted by the Section Council on May 13. Feller died on February 10 at the age of 86. During his remarkable career, Feller distinguished himself as a labor lawyer, Supreme Court advocate, law professor, and labor arbitrator.

Feller's former student, Judge Marsha Berzon of the U.S. Court of Appeals for the Ninth Circuit, has commented that "David Feller had been, before coming to academia, the leader of a group of lawyers who helped to create, somewhat out of whole cloth, the law governing arbitration and mature collective bargaining."

Feller was born in New York City and grew up in Harrisburg, Pennsylvania. He attended Harvard University and Harvard Law School, graduating *magna cum laude* from both. He served as an editor of the *Harvard Law Review*. After a period lecturing at the University of Chicago, Feller served as a U.S. Army photo intelligence officer in World War II and was awarded the Bronze Star.

**Berzon: "He is the person all his former colleagues would quote to younger lawyers."**

In 1948, Feller became Chief Law Clerk for U.S. Supreme Court Justice Fred Vinson. After completing his clerkship, Feller was hired by future U.S. Secretary of Labor and Supreme Court Justice Arthur Goldberg, then General Counsel of the CIO and the United

Steelworkers of America. In 1955, he became a law partner of Goldberg in the firm of Goldberg, Feller & Bredhoff. Feller litigated in the courts and before the NLRB, served as a lead negotiator in collective bargaining for the Steelworkers, and participated in the negotiation of the agreements between the AFL and the CIO that led to their merger.

As counsel for the CIO, the Steelworkers, and other unions, Feller was an advocate in many landmark labor law cases before the Supreme Court. He briefed *Textile Workers v. Lincoln Mills* (1957), in which the Court established Section 301 of the National Labor Relations Act as the source of federal common law for the enforcement of collective bargaining agreements.

He argued in each of the "Steelworkers Trilogy" cases—*United Steelworkers v. American Mfg. Co.*, *United Steelworkers v. Warrior & Gulf Nav. Co.*, and *United Steelworkers v. Enterprise Wheel & Car Corp.* (1960)—which made labor arbitration subject to federal law and established the dominant role of the arbitrator in interpretation of collective bargaining agreements. The Trilogy also established the doctrine of judicial restraint where the agreements provided for arbitration.

He argued *Vaca v. Sipes* (1967), in which the Court ruled that courts lack jurisdiction over individual employee claims of employer violations of the collective bargaining agreements, unless a union violates its duty of fair representation in processing the claim under the grievance and arbitration machinery. The Court held such duty is violated only when

the union's action is arbitrary, discriminatory, or in bad faith.

Calling Feller's advocacy "the gold standard," Judge Berzon says, "He is the person all his former colleagues would quote to younger lawyers. Reading Professor Feller's briefs in the key [Supreme Court] cases . . . and then the resulting opinions, one is struck by how some of the opinions read as simple-minded versions of his briefs, lacking their depth and grounding in the realities of the industrial workplace."

Georgetown Law School Professor Michael Gottesman, who worked as a junior lawyer under Feller from 1961 to 1965, has commented, "I can't think of another lawyer who has put his or her stamp on a field of law as Dave did on the law governing enforcement of the collective bargaining agreement."

In 1967, Feller joined the faculty of the Boalt Hall School of Law at the University of California, Berkeley. He taught labor law and developed a popular course in appellate advocacy. He served as secretary of the ABA Labor and Employment Law Section in 1972. He served as chair of the Berkeley Faculty Association from 1971 to 1980, exerting major influence in 1978 in the adoption of enabling legislation for collective bargaining by public sector higher education faculty in California. In 1987, he was awarded the prestigious Berkeley Citation for his extraordinary achievements in labor law and his outstanding service to the Berkeley campus.

During his Berkeley years, Feller

began serving as an arbitrator, and developed a reputation as one of the nation's leading arbitrators. In 1992 he served as president of the National Academy of Arbitrators. He continued to write *amicus* briefs in Supreme Court cases to preserve interpretations



Feller as a young lawyer.

of Section 301 as enunciated in the cases he had litigated.

Feller was also active in civil rights litigation. He served on an advisory committee of lawyers that assisted NAACP General Counsel Thurgood Marshall in the school segregation cases. He wrote or contributed to numerous *amicus* briefs in Supreme Court cases, including *Brown v. Board of Education* and *University of California v. Bakke*.

In its May 13 Resolution, the Section "remembers a giant of our profession," and joins the Feller family "in grieving Dave's passing and in celebrating his distinguished and meaningful life." ■

## Supreme Court

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question of whether the FMLA was a valid exercise of power under the Fourteenth Amendment.

The Court found sufficient evidence that Congress was motivated by evidence of unconstitutional gender discrimination by states in the administration of leave benefits, stating that “Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.”

## The Court found that Congress was motivated by evidence of unconstitutional gender discrimination by states.

Crucially, the Court explained that because policy distinctions based on gender are subject to heightened scrutiny, the standard by which it will review the constitutionality of a congressional action to prevent gender discrimination by states is lower than where Congress acts to prevent discrimination by states on some other basis. This distinguishes *Hibbs* from earlier cases in which the Court had declined to abrogate state immunity and permit application of federal age and disability discrimination laws.

In a dissent joined by Justices Scalia and Thomas, Justice Anthony Kennedy rejected the majority's finding that Congress had acted to remedy unconstitutional discrimination by states. Describ-

ing the FMLA as “an entitlement program, not a remedial statute,” the dissent stated that the majority opinion had failed to show “that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits.”

In concurring opinions, Justices Souter, Ginsburg, Breyer, and Stevens noted that they were joining the majority opinion while maintaining their views of broader congressional power over states as expressed in their dissents in earlier state immunity cases.

“Federal laws banning or ameliorating sexual or racial discrimination—including stereotyping—

are on a different plane than other laws regulating the employment relationship, in part because heightened scrutiny makes it easier to amass the necessary facts supporting Congressional abrogation of Eleventh Amendment immunity,” noted Seymour. “As to other laws, practitioners need to focus on whether there was substantial evidence before Congress of constitutional level violations.”

“As regards family leaves,” says Cathcart, “the message to Congress is that accommodations of work and family obligations should be measured by the same yardstick in public and private workplaces. *Hibbs* teaches that this is good constitutional law and most observers will conclude that this is also good public policy.” ■

### CORRECTION

In our previous announcement of the Annual Meeting election for new officers (to be held on Tuesday, August 12 at 5:15 P.M.), the Chair-Elect affiliation should have been noted as “(Employer).” Also to be elected, but not mentioned in the announcement, are the Section Delegates to the House of Delegates (Union & Employee), and two Section Vice-Chairs (Employer and Union & Employee).

## Midwinter Meeting Papers Available Online

The Section produced another round of successful committee Midwinter Meetings this past spring. Attendance was at record highs for most sessions, which were loaded with top-notch speakers who delivered high-impact presentations on all facets of labor and employment law.

These programs also provided excellent networking opportunities and a host of avenues for new members to participate. If you missed any of these events, check out the paper presentations posted on the Section's website at [www.abanet.org/labor](http://www.abanet.org/labor) under the “Publications” tab. This benefit is offered only to Section members. When accessing the material, your user ID is your ABA ID and your password is your last name in lowercase letters.

In addition to being available on the website, the following program materials have been reproduced in hard copy:

### Employment Rights & Responsibilities—\$85

This is a two-volume set with approximately 1,200 pages and includes topics such as:

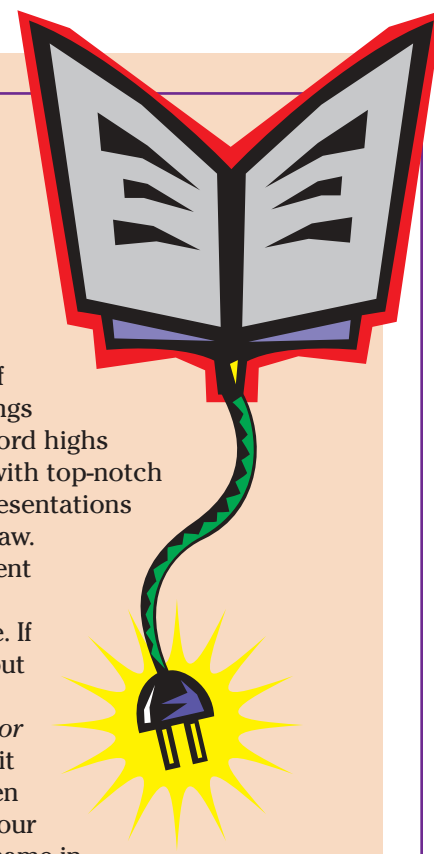
- Surveillance in the Workplace: Sources of Law and Illustrative Cases
- Tips for Handling EPLI Cases
- Mixing Business with Pleasure: Workplace Romance
- Workplace Violence: What Resources Do Individual Employees Have?
- Strategies for Employers to Reduce the Risk of Class Actions
- Whistleblower Protections Under *Sarbanes-Oxley*

### Equal Employment Opportunity—\$85

This two-volume set has approximately 1,200 pages. Topics include:

- Annual Update: Review of Leading EEO Cases
- How to Deal with a Disabled Plaintiff, Your Opponent's Expert, and the Jury
- Harassment Update
- Advocacy Mistakes and Successes in Mediation
- Enforceability Issues of Arbitration (*Circuit City* and *Waffle House*)
- Managing Leave and Reasonable Accommodations in a Large Organization

To order hard copies, please call Maria Vakos at 312/988-5523. ■



## Section and BNA Produce New Book on Labor Union Laws, Regulations

The relations between unions, members, and union-represented employees are governed by a patchwork of frequently overlapping and often conflicting laws—a number of federal statutes and the precedents of federal agencies and federal and state courts.

In the past, when a particularly tough issue in this area arose in the course of my practice, I might have called on my good friends Gary Witlen of the IBT or Ted Green of the Laborers for advice, or I might have called Vicki Bor of Sherman, Dunn or Harold Datz at the NLRB if the problem involved a difficult union security issue. Unfortunately, there was not a comprehensive legal treatise in this area available to labor and employment law practitioners who were not fortunate to have such experienced practitioners on call.

In 1997, nine of us agreed to put such a treatise together under the aegis of the Section's Union Administration and Procedure Committee, so that everyone on all sides of a problem could proceed from the same basic understanding of the law. None of us thought it would take this long, and the project might well not have gotten started if we had known what we were getting into.

Now, only six short years later, BNA is publishing *Labor Union Law and Regulation*, the collaborative work product of the following confederates:

### Editor-in-Chief

William W. Osborne Jr., Osborne Law Offices P.C., Washington, D.C.  
Co-Chair, Committee on Union Administration and Procedure, ABA Section of Labor and Employment Law.

### Senior Editors

Jonathan G. Axelrod  
Beins, Axelrod, Kraft,  
Gleason & Gibson PC  
Washington, D.C.

Victoria L. Bor  
Sherman, Dunn, Cohen,  
Leifer & Yelling PC  
Washington, D.C.

Harold J. Datz  
Chief Counsel to the Chairman  
National Labor Relations Board  
Washington, D.C.

Theodore T. Green  
Laborers' International  
Union of North America  
Washington, D.C.

Robert Matisoff  
O'Donoghue & O'Donoghue  
Washington, D.C.

Eben O. McNair IV  
Schwarzwald & McNair LPA  
Cleveland, Ohio

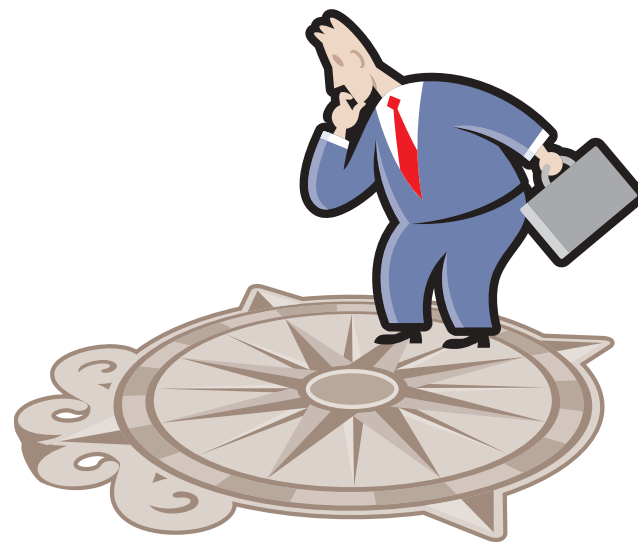
Mimi C. Satter  
Satter & Andrews LLP  
Syracuse, N.Y.

Gary S. Witlen  
Director, Legal Dep't  
Int'l Brotherhood of Teamsters  
Washington, D.C.

It is our hopeful intention that this work will cause these laws to be more consistently applied and more understandable to all, and that legal problems attributable to an ignorance or misunderstanding of the law will be diminished.

Information on purchasing copies at the Section member discount can be found in the Section treatise order form in this newsletter on page 7.

Bill Osborne



## New Benefit for Members: Employment Arbitrator List

Looking for an arbitrator in Montana? The Section's Committee on ADR in Labor and Employment Law has received the necessary approvals to create an Employment Law Arbitrator List. The list will be available to members on the Section website at no cost. This list will allow Section members to designate themselves as employment arbitrators and will be accessible only to members who are seeking such arbitrators. This list will be for employment arbitration only and not for the purpose of selecting arbitrators of labor disputes arising under collective bargaining agreements.

This service is of value to both those who wish to serve as arbitrators and those seeking neutrals throughout the country.

To be included on the list, please complete the application form found on the Section's website at [www.abanet.org/labor/mo/map/map.html](http://www.abanet.org/labor/mo/map/map.html). You can also view the list of those willing to serve as arbitrators by using the same site. ■

## Outreach Task Force Seeks Your Input

The Outreach to Aspiring and Young Lawyers/YLD Fellowships Task Force seeks to assist young lawyers with career development opportunities. The Task Force requests the input of Section members in developing a program to post job openings and career opportunities for young lawyers in law firms, labor unions, government departments and agencies, and other organizations that deal with labor and employment matters. Specifically, we would like to hear ideas on (1) how best to communicate with potential employers concerning the benefits of such a program, (2) how to register and list interested employers, (3) what standards and protocols should be used, (4) how to market to young lawyers, and (5) how to facilitate communications between young lawyers and potential employers. The Task Force plans to add links to the Section web page and coordinate with the ABA Career Resource Center.

Send suggestions to John Quinn at [quinn@nqwlaw.com](mailto:quinn@nqwlaw.com) or Toya Cook Haley at [thaley@winstead.com](mailto:thaley@winstead.com). ■

# Calendar of Events

## 2003

### August 9-12

ABA Annual Meeting  
Grand Hyatt Union Square  
San Francisco, California

### September 19

National Labor Relations Act  
Basic Law and Procedures  
Dallas, Texas

### October 16-18

Sports and Entertainment Labor  
Law Committee Fall Meeting  
Westin New York at  
Times Square  
New York, New York

### October 22

Equal Employment Opportunity  
Basics  
Denver, Colorado

### December 5

FMLA/FLSA Basic Law and  
Procedures  
Atlanta, Georgia

## 2004

### January 14-17

Labor and Employment Law:  
The Basics  
Washington, D.C.

### February 18-20

Federal Labor Standards  
Legislation Committee Midwinter  
Meeting  
Wyndham Sugar Bay Resort & Spa  
St. Thomas, U.S.V.I.

### October 2

Equal Employment Opportunity  
Basic Law and Procedures  
Indianapolis, Indiana

### October 2-3

Health and Welfare Benefits  
Plans  
Sponsored by the Joint  
Committee on Employee Benefits  
Washington, D.C.

### October 24

Federal Labor Standards  
Legislation Committee Fall  
Meeting  
Washington, D.C.

### November 6-7

Compensation for Executives and  
Directors  
Sponsored by the Joint  
Committee on Employee Benefits  
New York, New York

### January 16-18

Ethics & Professionalism  
Committee Midwinter Meeting  
Camino Real  
Puerto Vallarta, Mexico

### February 4-7

Employee Benefits Committee  
Midwinter Meeting  
Ritz-Carlton  
New Orleans, Louisiana

### February 19-21

State Labor and Employment  
Law Developments Committee  
Midwinter Meeting  
Wyndham Sugar Bay  
Resort & Spa  
St. Thomas, U.S.V.I.

### February 23-27

Practice and Procedure under  
the NLRA Committee Midwinter  
Meeting  
Grand Bay Hotel Isla  
Navidad Resort  
Manzanillo, Mexico

### October 3

FMLA/FLSA Basic Law and  
Procedures  
Indianapolis, Indiana

### October 3-5

Council Meeting  
Fairmont Banff Springs  
Banff Springs, Alberta, Canada

### November 7

Employment Litigation Skills  
Miami, Florida

### November 13-15

ERISA Litigation  
Sponsored by the Joint  
Committee on Employee Benefits  
Chicago, Illinois

### February 4-10

ABA Midyear Meeting  
San Antonio, Texas

### February 5-7

State and Local Government  
Bargaining and Employment Law  
Committee Midwinter Meeting  
President Intercontinental  
Cozumel, Mexico

### February 29-March 3

Development of the Law under  
the NLRA Committee Midwinter  
Meeting  
Mauna Lani Bay Hotel  
Big Island, Hawaii

### October 15

Practicing Law in a Post-9/11  
World Teleconference

### October 15-18

Labor and Employment Law:  
The Basics  
Boston, Massachusetts

### November 14

Equal Employment Opportunity  
Basics  
Hofstra University  
Hempstead, New York

### November 20

NLRA Basics  
Cleveland, Ohio

### February 8-11

ADR in Labor and Employment  
Law Committee Midwinter  
Meeting  
Westin Regina  
Puerto Vallarta, Mexico

### March 2-5

Occupational Safety and Health  
Law Committee Midwinter  
Meeting  
L'Auberge Del Mar  
Del Mar, California

**For more information on any of these events, please contact the Section office at 312/988-5813 or check the Calendar Web page at [www.abanet.org/labor/calendar.html](http://www.abanet.org/labor/calendar.html).**

# INSIDE SUMMER 2003

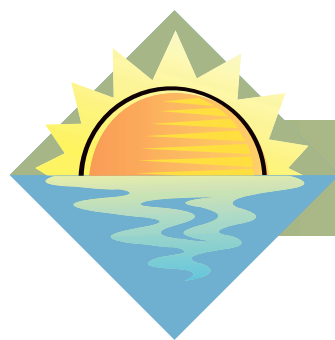
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| 1  | SUPREME COURT: FMLA             |
| 2  | COMMENTS FROM THE CHAIR         |
| 3  | PROFILE: BETTY MURPHY           |
| 4  | SPOTLIGHT ON                    |
| 6  | Q&A: IT STARTS WITH A PLAN      |
| 8  | SECTION REMEMBERS DAVID FELLER  |
| 9  | MIDWINTER MEETING PAPERS ONLINE |
| 11 | CALENDAR OF EVENTS              |



Section of Labor and Employment Law  
American Bar Association  
750 North Lake Shore Drive  
Chicago, Illinois 60611



## New Treatises Released— See Page 7 For Details



### The Section Remembers

Jared H. Jossem

Long-time Section member Jared H. Jossem died April 21 after a long battle with cancer.

Jossem began his career in Chicago as a trial attorney with the National Labor Relations Board (NLRB). He moved to Hawaii in 1970 and became Chair of the Labor and Employment Law Department at the Torkildson law firm, which he helped build during a 26-year period. He then spent two years with a Washington, D.C.-based firm, where he continued his broad Hawaii and Pacific labor law practice, including significant

litigation and labor relations accomplishments. Jossem and Lynne Toyofuku founded Jossem & Toyofuku in 1998, and in 2001 their firm merged with another firm to become Dwyer Schraff Meyer Jossem & Bushnell.

Jossem served as a lecturer for the American Bar Association and other national groups on labor and civil rights topics. He was a successful lead counsel in many reported court and arbitration cases.

Jossem was founding editor of the Hawaii Chamber of Commerce *Labor Law Desk Manual* and author

of the *Model Employee Handbook*. He also published articles on a variety of labor and civil rights issues, including "Investigating Sexual Harassment Complaints: Guidelines for Employers" in *Litigating the Sexual Harassment Case* (ABA Tort Trial and Insurance Practice Section, 1994). At the time of his death, he was an editor of the Section's treatise *How to Take a Case Before the NLRB*, published by the Section of Labor and Employment Law with BNA Books. ■

